EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

No. 90-1499

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

JAMES ROWLAND, DIRECTOR,
CALIFORNIA DEPARTMENT OF CORRECTIONS, et al.,

Petitioners,

v.

MAURICE S. THOMPSON, et al.,

Respondents.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

DONALD SPECTER
[Counsel of Record]
STEVEN FAMA
ARNOLD ERICKSON

Prison Law Office
General Delivery
San Quentin, CA 94964
Telephone No: (415) 457-9144

Attorneys for Respondents

QUESTIONS PRESENTED

I. Whether a consent decree in a complex civil rights case should be dissolved when, over the last decade, no court has ever found defendant-prison officials have fully complied with the decree, but in prior orders and the one being appealed the court has found numerous continuing violations of the decree and two significant violations of the Constitution?

II. Whether the Eleventh Amendment bars a court from enforcing a consent decree that resolves federal constitutional issues arising from the Eighth and Fourteenth Amendments?

III. Whether the lower courts properly ruled on prison officials' motion to modify the consent decree when in granting many of the requested modifications the courts rejected the rigid Swift test, but instead applied a flexible standard in order to accommodate the state's legitimate interests in prison security and fiscal economy?

IV. Whether prison officials who, over the last eight years, have had multiple opportunities to appeal orders interpreting, modifying and refusing to dissolve a consent decree and who have acted in conformity with those orders may litigate the same issue on an appeal of an order directing them to comply with the decree?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv-vi
OPINION BELOW	1
JURISDICTION AND STATUTES PRESENTED	1
STATEMENT OF THE CASE	1
A. Introduction	1
B. Initial Proceedings	4
C. The Consent Decree	6
D. A Summary of Prison Officials' Early Failures to Comply with the Decree	8
E. The Monitor's First Report	10
F. The Monitor's Second Report	11
G. The Monitor's Third Report	11
H. Petitioners' Motions before the Monitor to Vacate or Modify the Decree	12
I. The Monitor's Fourth Report	15
REASONS FOR DENYING THE WRIT	18
I. THIS COURT NEED NOT DECIDE WHETHER THE CONSENT DECREE SHOULD BE DISSOLVED BECAUSE NEITHER THE COURT OF APPEALS OR THE DISTRICT COURT'S DECISION CONFLICTS WITH BOARD OF EDUCATION v. DOWELL (1991) 498 U.S. ___, 112 L.Ed.2d 715	18
A. The Ninth Circuit's Decision	18
B. Dowell is Factually Different and Legally Distinct From the Issues Presented by This Case	19

II.

THE NINTH CIRCUIT'S REJECTION OF PETITIONERS' ELEVENTH AMENDMENT CLAIM DOES NOT CONFLICT WITH THE DECISION IN PENNHURST OR WITH OTHER COURT OF APPEALS DECISIONS, AND BECAUSE PETITIONERS, BY AGREEING TO THE DECREE AND FAILING TO RAISE ANY SUCH CLAIM FOR MANY YEARS, LONG AGO WAIVED ANY ELEVENTH AMENDMENT DEFENSE 22

III.

THE NINTH CIRCUIT'S AFFIRMANCE OF THE DISTRICT COURT'S CAREFULLY CONSIDERED, FACT-SPECIFIC, FLEXIBLE RULINGS REGARDING DECREE MODIFICATIONS DOES NOT CONFLICT WITH THIS COURT'S DECISIONS REGARDING THE DEFERENCE DUE PRISON OFFICIALS BECAUSE, EVEN ASSUMING THAT DEFERENCE MUST BE GIVEN TO PRISON OFFICIALS' VIEWS IN DETERMINING MODIFICATIONS TO CONSENT DECREES, THE COURTS BELOW DID SO 28

IV.

THERE IS NO CONFLICT AMONG THE CIRCUITS ON THE APPEALABILITY OF POST-JUDGMENT ORDERS AFFECTING AN EQUITABLE DECREE 33

A. The Ninth Circuit's Ruling Does Not Conflict with the First Circuit 33

B. The Appealability of the District Court's Orders 35

C. Petitioners' Conduct Estops Them From Prevailing 37

CONCLUSION 38

TABLE OF AUTHORITIES

Cases

Board of Education v. Dowell, 498 U.S.___, 112 L.Ed.2d 715 (1991) 18-21

Bounds v. Smith, 430 U.S. 817 (1977) 21

Carson v. American Brands, Inc., 450 U.S. 79 (1981) . . 34-36

Chronicle Pub. Co. v. Hantzis, 902 F.2d 1028-1031 (1st Cir. 1990) 34

Davis v. Waklee, 156 U.S. 680 (1985) 37

Delaware Valley Citizens' Council v. Commonwealth of Pennsylvania, 678 F.2d 470, (3rd Cir.) cert. denied, 459 U.S. 969 (1982) 23

Duran v. Carruthers, 885 F.2d 1485 (10th Cir. 1989) . . 26, 27

EEOC v. Pan American World Airways, Inc., 796 F.2d 314 (9th Cir. 1986) 34

Garrity v. Sununu, 752 F.2d 727 (1st Cir. 1984) . . . 24

Ibarra v. Texas Employment Commission, 823 F.2d 873 (5th Cir. 1987) 27

International Association of Machinists v. Eastern Airlines, 849 F.2d 1481 (D.C Cir. 1988) 37

Jett v. Zink, 474 F.2d 149 (5th Cir.), cert. denied, 414 U.S. 854 (1973) 38

Kerwit Medical Products Inc. v. N. & H. Instruments, Inc., 616 F.2d 833 (5th Cir. 1980) 36

Kozlowski v. Coughlin, 871 F.2d 241 (2d Cir. 1989) . . 26, 27

Lelsz v. Kavanagh, 807 F.2d 1243 rehearing denied, 815 F.2d 1034 (5th Cir.), cert. dismissed, 108 S.Ct. 44 (1987) 26, 27

Lelsz v. Kavanagh, 824 F.2d 372 (5th Cir. 1987) . . . 26, 27

Local Number 93, International Association of Firefighters v. City of Cleveland, 478 U.S. 501 (1986) 24-26, 28, 29

Marin v. Rowland, C-80-0012 MHP 21

New York State Association for Retarded Children v. Carey, 596 F.2d 27 (2d Cir. 1979) 23

Pennhurst State School & Hospital v. Halderman, 465 U.S. 89 (1984) 22, 23, 28

Ramirez v. Rivera-Dueno, 861 F.2d 328 (1st Cir. 1988) . . 33, 34 35

Roberts v. St. Regis Paper Co., 653 F.2d 166 (5th Cir. 1981). 34, 36

Rockwell International v. Hanford Atomic Metal Trades Council, 851 F.2d 1208 (9th Cir. 1988) 38

Scarano v. Central Railway Co. of New Jersey, 202 F.2d 510 (3rd Cir. 1953) 38

Suffolk County Jail cases, 59 U.S.L.W. 3546-3547 . . . 30

Szabo v. U.S. Marine Corp., 819 F.2d 714 (7th Cir. 1987) . 36

Thompson v. Enomoto, 542 F.Supp. 758 (N.D. Cal. 1982) . . 9, 36

Thompson v. Enomoto, 815 F.2d 1323 (9th Cir. 1987) . . 1, 6, 10, 35

Thompson v Enomoto, 915 F.2d at 1389-1390 . . . . . 37, 38

Toussaint v. McCarthy, 597 F. Supp. 1427 (N.D. Cal. 1984) . 21

Toussaint v. McCarthy, 597 F. Supp. 1388 (N.D. Cal. 1984) aff'd in relevant part, 801 F.2d 1080 (9th Cir. 1986) . 13, 21

Toussaint v. McCarthy, 801 F.2d 1080 (9th Cir. 1986) . . 21

Toussaint v. McCarthy, 918 F.2d 752 (9th Cir. 1990) . . 21

Turner v. Safely, 482 U.S. 78 (1987) 29, 32

United States v. Swift & Co., 286 U.S. 106 (1932) . . . 19, 20, 30

Washington v. Penwell, 700 F.2d 570 (9th Cir. 1983) . . 27

Wright v. Enomoto, 462 F.Supp. 397 (N.D. Cal. 1976) sum. aff'd sub nom. Enomoto v. Wright, 434 U.S. 1052 (1978) 9

Statutes and Rules

28 U.S.C. §1292(a)	34
28 U.S.C. §1291	35
Federal Rules of Civil Procedure, Rule 23	12
Supreme Court Rule 14.5	3

Respondents, the plaintiff class, consisting of more than 300 men confined on Death Row at San Quentin State Prison and subject to petitioner-defendants' custody and control, respectfully request that this Court deny the Petition for Writ of Certiorari.

OPINION BELOW

The opinion below is correctly identified in the Petition at 1. In addition, another opinion in this case filed by the Ninth Circuit relevant to these proceedings is published at 815 F.2d 1323 (9th Cir. 1987).

JURISDICTION AND STATUTES PRESENTED

These matters are accurately set forth in the Petition at 1-2.

STATEMENT OF THE CASE

A. Introduction

This case is about a Consent Decree governing prison conditions and practices for all California male prisoners who are condemned to die. Petitioners ask the Court to grant certiorari to review a Ninth Circuit decision affirming a District Court order denying in part their motion to modify the Decree and denying in full their motion to vacate the Decree. The petition is based on fundamental misconceptions about the Ninth Circuit's decision and petitioners' past conduct.

The Court of Appeals' opinion breaks no new ground when reviewing the district court's legal conclusions or discretionary decisions. It reaffirmed the use of a flexible standard for

modifying consent decrees in institutional reform litigation and properly applied the doctrine of estoppel when reviewing petitioners' claims that the Decree covered only one unit at San Quentin.

Contrary to the rosy picture petitioners paint of their conduct during the last decade, the record reveals a less charitable portrait. Petitioners have been charged with contempt seven times and have been found in contempt three times. They continue to violate the constitutional rights of condemned prisoners to this day. Their legal positions have shifted with the convenience of the moment leading the lower courts to apply the doctrines of judicial and equitable estoppel.

In the face of petitioners' continuing intransigence the District Court has had to appoint a Special Master, known as the Monitor, to investigate and resolve the issues. The Monitor has issued four reports concerning petitioners' repeated failures to abide by the Consent Decree. Petitioners have challenged the District Court twice before the Court of Appeals: once for appointing the Monitor and again for approving the Monitor's recommendations.

Now two years after the evidentiary hearing that resulted in the Monitor's most recent report, petitioners continue before this Court their struggle to rid themselves of the obligations created by their own promises made binding on them by the consent judgment.

There are four basic reasons why this Court should deny [illegible]. First, the Court of Appeals opinion does not present issues of national importance. As explained in detail below, its holdings do not conflict in any way with decisions of this Court or

of other circuits. That is true in part because the decision is extremely fact specific.

Second, it is clear from the record that the delay in resolving this case is attributable largely to petitioners' continuing violations of the Decree and the Constitution. If the Court grants the writ it will delay for another year or more petitioners' obligation to develop a plan that finally will implement provisions of a modified Decree and eventually release all parties from further litigation.

Third, despite petitioners' hyperbole to the contrary, the record demonstrates that the District Court and its Monitor have bent over backwards to accommodate prison officials' legitimate concerns arising from changed circumstances and have modified the Decree accordingly.

Both lower courts have tried faithfully to finally resolve the issues in this complex case while remaining true in principle and in fact to this Court's prior decisions, especially those touching on tenets of federalism and comity. The petition filed by prison officials presents no good reason to further extend this process.

The petition itself, however, presents an affirmative reason for denying the writ. The petition is rife with factual error and misleading statements. Rule 14.1 provides that petitioners' failure to present with accuracy the facts necessary to an adequate understanding of the questions presented is sufficient reason to deny the petition. Below respondents will set forth an accurate history of this case and specifically correct the most glaring and significant errors contained in the petition.

B. Initial Proceedings

The complaint in this action was filed in the Northern District of California on July 6, 1979 on behalf of a class consisting of all prisoners who were then or in the future would be condemned to death by the State of California and housed at California's San Quentin Prison. ER 1-30.[1/] The defendants were the Director of the California Department of Corrections and the Warden of San Quentin in their official capacities. The complaint alleged that the conditions of confinement of condemned inmates at San Quentin violated the cruel and unusual punishment clause of the Eighth Amendment, the due process and equal protection clauses of the Fourteenth Amendment, the free exercise clause of the First Amendment, and various provisions of state law.

At the heart of the complaint was the automatic assignment of all condemned prisoners to "Maximum A" status, the highest security risk classification in the California system, and their consequent confinement in administrative segregation.

The prisoners alleged that California regulations governing the placement of prisoners in administrative segregation created a

---

1. The following references will be used for documents filed in this Court and the lower courts:

Petition.	Pet.
Petitioner's Appendix	Pet. App.
Excerpt of Record filed in the Ninth Circuit . . .	ER
Plaintiffs' Supp. Excerpt of Record filed in the Ninth Circuit	PSER
Clerk's Record of Documents filed in the District Court.	CR

liberty interest under which all prisoners, including the condemned, were entitled to remain in the general population unless there was a factual finding, following fair procedures, that a particular prisoner had violated prison rules or otherwise constituted a threat to institutional security. ER 5, 9. The prisoners alleged that they were wrongfully deprived of the individualized factual classification decisions afforded to all other types of California prisoners.

Consistent with their automatic Maximum A status, condemned prisoners were segregated from the general population at San Quentin and, at the time the complaint was filed, housed together in the North Segregation Unit ("North Seg"), commonly known as Death Row, on the top floor of the North Cell Block.

The prisoners complained of many aspects of the regimen imposed upon them by their security classification and segregation confinement. The regimen included solitary confinement in cells measuring four and one-half by ten feet in an unsanitary, dark and poorly-ventilated cell block, with no more than three hours of yard exercise every four days and a five minute shower twice a week. ER 6-7.

As Maximum A inmates, respondents were also subject to other significant deprivations and restrictions which were not imposed upon their general population counterparts. Condemned prisoners were manacled at all times when leaving their cells. ER 7. Unlike the general population, they were not allowed contact visits with their families and friends. Instead, they could only visit using telephones, separated from their visitors by a heavy glass barrier. ER 6. In addition, they were forced to wear waist restraints during

their visits. Id. Unlike the general population, condemned prisoners were not allowed to work or to participate in educational or vocational programs or to attend religious services. ER 8.

Respondents alleged that there was no legitimate penological or security basis for their segregation based on their death sentences alone. ER 8. In other words, a prisoner's prospects for in-prison behavior could not be determined merely from his commitment offense or death sentence. ER 6. Plaintiffs also alleged that the security precautions in effect to guard San Quentin's general population prisoners were adequate to manage the risks posed by condemned prisoners. ER 5.

C. The Consent Decree

After several months of discovery and intensive negotiations, both sides agreed to compromise and settle the litigation by means of a detailed Consent Decree (the "Decree"). The Decree was approved and entered as a judgment of the District Court on October 23, 1980. ER 49-68.

The Decree reflects a compromise of the prisoners' Fourteenth Amendment claims. Prison officials were permitted to continue segregating prisoners instead of housing them with the general population. However, petitioners were restrained from subjecting condemned prisoners as a class to the entire regimen of Maximum A segregation.

Instead, the Decree requires prison officials to afford condemned prisoners who do not present an unusual security risk and who exhibit conforming behavior (defined as Grade A condemned) many of the same rights and privileges accorded to general population

prisoners. The Decree also provides a procedure whereby a prisoner may, on disciplinary or security grounds, be reclassified to Grade B condemned and deprived of some of these privileges. A third category is Walkalones, which refers to prisoners who would be Grade A, except that other Grade A's will not tolerate them.

Unless placed in Grade B or Walkalones status, prisoners are entitled under the Decree to six hours of indoor out-of-cell time per day and twelve hours of yard exercise time per week, ER 57; to contact visits with their families and friends, ER 65-66; to a variety of yard equipment, ER 58-59; to eat lunch outside their cells with other inmates, ER 60; to religious services, ER 62-63; to participate in the art hobbycraft program, ER 62; to participate in some educational programs, ER 63; to make purchases from the prison canteen on the same basis as the general population, with certain limited exceptions, ER 61-62; and to use tier telephones for personal calls, ER 67.

Other provisions of the Decree are based on Eighth Amendment rights, including those regarding sanitation, ER 63-64; food service, ER 59-60; medical care, ER 64-65; and laundry exchange, ER 64.

Finally, the Decree attempts to guarantee due process and Sixth Amendment rights of access to the courts by providing for very limited law library facilities, ER 66-67; and attorney-client visiting procedures, ER 67.

The Decree was to expire of its own accord within one year if prison officials implemented all its provisions. ER 50. To this day, petitioners have not fully complied with the Decree.

When the Decree was entered, the plaintiff class was all housed in North Seg. Ongoing increases in the size of the class led petitioners thereafter to confine some condemned prisoners in a separate building called the Adjustment Center and others in Carson Section of the South Cell Block. Eventually, the majority of condemned prisoners were relocated to the East Cell Block.

D. A Summary of Prison Officials' Early Failures to Comply with the Decree

Petitioners claim here, without citation to the record, that prison officials remain subject to the court's jurisdiction although they have complied with the Decree in North Seg since April 1982. Pet. at 2, 17. This claim is erroneous. No court has ever found petitioners in full compliance with the Decree for prisoners housed in North Seg[2/] or any other unit. Indeed, starting shortly after the Decree was approved, noncompliance has been the norm rather than the exception.

Before the Decree was to expire by its own terms, respondents moved to extend jurisdiction because prison officials were denying to all prisoners wherever housed the type and amount of attorney and personal visits required by the Decree, and they were not properly screening correctional officers assigned to units housing condemned prisoners. CR 99, 100. Respondents also maintained that petitioners were not complying with additional provisions of the Consent Decree in the Adjustment Center. CR 100.

---

2. At the time of the Monitor's two most recent investigations no prisoners were housed in North Seg because the unit was being renovated. Pet. App. A-54; ER 161.

On November 20, 1981, petitioners filed a counter-motion asking the District Court to modify the Decree to delete provisions which they claimed they could not comply with in the Adjustment Center. PSER 1. They did not contend that the Decree only applied to condemned prisoners when confined in North Seg. On January 20, 1982, the District Court modified the Decree in parts relevant to the Adjustment Center and extended jurisdiction to ensure substantial compliance.

A few month later, on April 20, 1982, the prisoners again moved to hold petitioners in contempt for failure to comply with the Decree in the Adjustment Center, even as modified. CR 137. Petitioners admitted noncompliance, but opposed the motion on the ground that compliance was impossible because of structural differences in the Adjustment Center. PSER 9. Again, petitioners did not contend that the Decree only applied to prisoners confined to North Seg. Id.

Instead of holding petitioners in contempt, the District Court continued the matter so that the parties could attempt to reach agreement upon modifications to adapt the Decree to the then current conditions in units other than North Seg. Thompson v. Enomoto, 542 F. Supp. 768 (N.D. Cal. 1982).[3/]

On January 14, 1983, respondents again moved to hold prison officials in contempt for failure to comply with provisions of the

---

3. Respondents' motion also sought to modify the Decree to provide that condemned prisoners who were denied privileges for disciplinary or security reasons would be entitled to hearings as required for non-condemned prisoners under Wright v. Enomoto, 462 F. Supp. 397 (N.D. Cal. 1976), sum. aff'd sub nom. Enomoto v. Wright, 434 U.S. 1052 (1978). The court denied this aspect of respondents' motion because the right to such relief was bargained away when negotiating the Decree. Id. at 770.

Decree which were unrelated to structural differences between North Seg and the Adjustment Center. CR 172, 173. Defendants opposed the motion, but once again did not contend that the Decree applied only when condemned prisoners were confined in North Seg. CR 183. The District Court found petitioners in contempt for violating the visiting provisions of the Decree. CR 206.

Frustrated by petitioners' noncompliance with the Decree and unable to negotiate a modification of the Decree, the prisoners moved the District Court in January 1985 to appoint a Special Master. Among other reasons in support of the motion, respondents identified over 30 continuing violations of the Decree, including inadequate lighting, inadequate medical and psychiatric care, the absence of a unit law library and insufficient showers. CR 227.

The District Court granted respondents' motion and appointed a Special Master, known as the Monitor. Pet. App. A-120. The court explained that petitioners' own intransigence necessitated the appointment. Pet. App. A-120. The court cited petitioners' record of noncompliance with the Decree, as well as their failure to present the court with any acceptable modifications, or to even acknowledge any violation of the Decree. Ibid. Petitioners appealed the District Court's order to the Ninth Circuit, but the appeal was dismissed. Thompson v. Enomoto, 815 F.2d 1323 (9th Cir. 1987).

E. The Monitor's First Report

The Monitor conducted an extensive investigation of petitioners' compliance with the Decree. His findings were detailed in his First Report, filed October 31, 1986. Contrary to petitioners' assertions, the Monitor found that prison officials were not complying with the

Decree in several respects. CR 316. However, he declined to find them in contempt. He also construed the Decree to apply only to those condemned prisoners confined in North Seg. Id.

Respondents appealed the Monitor's legal conclusion to the District Court. The court reversed the Monitor and held that the Decree applied to all condemned prisoners wherever housed. Pet. App. A-106. The court based its conclusion not only on the language of the Decree, but also on petitioners' post-Decree conduct and on its previous orders. ER 86-89. Defendants did not appeal from this order. The Ninth Circuit held that this was one of the appropriate times to appeal the scope of the Decree. Pet. App. A-9.

F. The Monitor's Second Report

Early in 1987 petitioners moved to modify the Decree to allow them greater latitude to handcuff condemned prisoners. After a hearing before the Monitor, the parties reached agreement on a modification to the Decree. Under the modification, which the District Court approved, petitioners were able to handcuff prisoners in exchange for allowing prisoners to possess certain typewriters and use weights for outdoor exercise. ER 155, 157. Petitioners agreed to and sought the court's approval of the modification even though weights and typewriters are not required by the Eighth Amendment or any other provision of federal law. ER 157.

G. The Monitor's Third Report

When negotiations again failed to resolve continuing issues relating to petitioners' noncompliance, the Monitor completed his investigation. In November 1988, the Monitor issued his Third Report. ER 158-202. This Report recommended that the District Court

order petitioners to show cause why they should not be held in contempt for numerous instances of noncompliance with the Decree. The Report clearly demonstrated that there was no factual dispute about petitioners' failure to comply with the Decree. ER 162.

When the Third Report was issued, all condemned inmates had been transferred to the East Block at San Quentin, a separate structure from any of those in which condemned prisoners had been confined previously. ER 162. In his Third Report, the Monitor noted that plaintiffs were "a class within the meaning of Rule 23 of the Federal Rules of Civil Procedure, consisting of all prisoners housed under sentence of death at San Quentin State Prison, wherever housed within that Prison." ER 166.

Petitioners did not file any objections to the Monitor's Third Report with the District Court, and on December 15, 1988, the Third Report was adopted by the District Court thereby ordering prison officials to show cause why they should not be held in contempt. ER 203-04. Again, petitioners did not appeal.

H. Petitioners' Motions before the Monitor to Vacate or Modify the Decree

Before the hearing on the order to show cause, petitioners filed a motion to vacate the Decree on the ground that the object of the Decree had been fulfilled by "operation of law" because current conditions of confinement, while not in conformity with the Decree, were nevertheless constitutional. They renew that argument before this Court, claiming in their petition that the conditions of confinement "over the years more than satisfied Eighth Amendment

standards . . . ." Pet. at 3. See also Pet. at 13, 17, 18. This factual assertion is at best misleading.

Not only has the District Court never made any findings on this issue, but four years after the Decree was entered the court in another case found that the conditions in units housing condemned prisoners violated the Eighth Amendment. Toussaint v. McCarthy, 597 F. Supp. 1388 (N.D. Cal. 1984) aff'd in relevant part 801 F.2d 1080 (9th Cir. 1986) chronicled the extent to which petitioners allowed conditions to deteriorate in East Block and other units at San Quentin. The horrible conditions found by the District Court, even after a preliminary injunction had been in effect, displayed an utter disregard by petitioners for the safety and well-being of prisoners in their custody. The one and only reason petitioners improved conditions was the permanent injunction, and it took seven years, under the court's constant supervision, for them to comply with this order.[4/] For petitioners to imply here that they maintain conditions consistent with the Eighth Amendment as a product of their own free-will and good faith is a gross distortion of the facts.

Petitioners compound their misstatement by asserting that the Monitor held that the Decree substantially exceeds applicable Eighth Amendment standards. Pet. at 9. The Monitor did nothing of the kind. The only authority cited by petitioners refers to the Monitor's discussion in the Fourth Report about prisoners' due process claims under the Fourteenth Amendment. Pet. App. A-58-62.

---

4. Only within the last two months did the court find that all aspects of the Toussaint injunction were being followed at San Quentin.

Petitioners also moved in the alternative to modify the Decree to conform with the manner in which they were presently confining death row inmates, thereby effectively mooting the question of contempt. CR 447. Petitioners claimed that they were complying with the Decree as much as possible under the circumstances. They renew this erroneous claim in their petition, stating that they used the Decree as a blueprint for designing a program for condemned prisoners in East Block. Pet. at 3. By their own admission, however, prison officials eliminated from the condemned program whatever provisions they considered "unnecessary [or] too burdensome." Pet. at 3. The predictable result is a program that bears little resemblance to the letter or intent of the original Decree.

One of the central features of the Decree is the opportunity for indoor out-of-cell time where prisoners can socialize and participate in programs in a fashion similar to general population prisoners. This feature is completely absent from the regimen imposed in East Block.[5] Petitioners claim that it is dangerous and costly to provide indoor exercise in East Block, but they made no attempt to provide an adequate substitute. After considering extensive evidence on this issue the Monitor and the District Court rejected petitioners' arguments. The District Court, in the order being appealed, found that petitioners could provide outdoor exercise time that is equal to or at least approximates the tier time required by

---

5. Petitioners' also have discarded other significant features of the Decree, including group religious services, canteen and cell furnishings. Pet. App. A-83, 88, 93.

the Decree without significant cost or disruption of the prison routine. Pet. App. A-67.

I. The Monitor's Fourth Report

After consideration of petitioners' motions, seven days of hearing and extensive post-hearing briefing, the Monitor issued his Fourth Report on August 1, 1989. ER 205-92. That Report and the court's order adopting it are the immediate subjects of the appeal and petition for writ of certiorari.

In his Fourth Report the Monitor recommended numerous modifications of the Decree sought by petitioners, found many violations of the Decree and two constitutional violations. The violations of the Decree included (1) the absence of a roof in the exercise yard to shield prisoners from inclement weather, (2) insufficient opportunities to shower, and (3) insufficient indoor exercise. Pet. App. A-63, A-69, A-79. In addition, the Monitor found that petitioners were violating prisoners' constitutional rights under the Eighth Amendment to be free from severe unrelenting noise, and Sixth and Fourteenth Amendments to access to the courts through physical presence in an adequate law library. Pet. App. A-98-101, A-103.

Petitioners claim here that the Monitor "ignored, summarily dismissed, or discounted" petitioners' evidence. Pet. at 9. Nothing could be further from the truth. In fact, the Monitor deferred in large measure to petitioners' opinions on security related issues, even when there was little, if any, factual basis to support those opinions. Pet. App. A-72, 84, 86, 89. On the central issue of indoor tier time the Monitor expressly appraised petitioners'

evidence in considerable detail before deciding the issue, largely in petitioners' favor. Pet. App. A-63-68. Also, the Monitor recommended modifying the Decree to take away from Grade B prisoners substantial property guaranteed by the original Decree. Pet. App. A-19. The Ninth Circuit correctly found that the Monitor based his recommendations on "specific facts and evidence." Pet. App. A-20 fn. 7.

The Monitor was similarly respectful of petitioners' legitimate interests when proposing a remedy. The Monitor did not blindly recommend to the court that petitioners be ordered to comply with every letter of the Decree. Instead, he made his recommendations based on a recognition that in institutional litigation the state and public interests at stake make it inappropriate to "interpret and enforce a consent decree as if it were strictly a 'bargain' between private parties." Pet. App. A-49. The Monitor also understood that concerns for preserving federalism require that any remedies imposed by a federal court must be narrowly tailored to cure the violation. Pet. App. A-50.

Using these principles as a guide, the Monitor deferred in large measure to prison officials' security and financial concerns. For example, he accepted prison officials' security arguments that the Decree should be modified to take away from Grade B condemned prisoners certain yard equipment, cell equipment, personal property, canteen items and access to telephones. Pet. App. A-19. He refused to apply the literal terms of the Decree to require indoor exercise in East Block. Instead he adopted a common sense solution and suggested that the District Court "avoid unnecessary entanglement in

an attempt to specify what structural modification might, or might not, allow a safe tier time program in East Block." Pet. App. A-66. The Monitor recommended, and the court ordered, that petitioners submit a plan to expand pre-existing outdoor exercise yard time so that it is substantially equivalent to the indoor tier time contemplated by the Decree. Pet. App. A-68.

Also, in his Fourth Report the Monitor denied petitioners' motions to vacate the Decree or modify it to conform to existing practices. Pet. App. A-62. He further recommended that the District Court order petitioners to remedy existing constitutional violations, again through common sense and cost-effective measures.[6/]

The District Court adopted the Monitor's Fourth Report in full and denied petitioners' motion to vacate or otherwise modify the Decree. Pet. App. A-39. Petitioners' appeal to the Ninth Circuit and their writ to this Court followed.

---

6. The Monitor noted that to comply with an injunction in another case pending against San Quentin petitioners developed a satellite law library in order to satisfy their constitutional obligations to another class of segregated inmates. He recommended that the Decree be modified so that condemned prisoners also have access to this library. Pet. App. A-100-101.

Similarly, the Monitor recommended applying to condemned prisoners the noise reduction measures already adopted in the other case and implemented in East Block. Pet. App. A-103-104.

REASONS FOR DENYING THE WRIT

I.

THIS COURT NEED NOT DECIDE WHETHER THE CONSENT DECREE SHOULD BE DISSOLVED BECAUSE NEITHER THE COURT OF APPEALS OR DISTRICT COURT'S DECISION CONFLICTS WITH BOARD OF EDUCATION v. DOWELL (1991) 498 U.S. ___, 112 L.Ed.2d 715

A. The Ninth Circuit's Decision

In Board of Education v. Dowell, 498 U.S. ___, 112 L.Ed.2d 715 (1991), the issue before the Court was whether a court imposed injunction concerning school desegregation should be dissolved when local officials have complied both with the injunction and the Constitution. The Court held dissolution is proper when the defendants have complied with the injunction for a reasonable period of time and were unlikely to return to their unconstitutional practices. Id. at 728.

The Ninth Circuit did not have any reason to decide this issue. In Dowell the district court issued a coercive injunction of indefinite duration. The issues presented here are framed by a voluntary consent decree that has an explicit sunset provision. Moreover, assuming the principles announced in Dowell apply to this type of consent decree, they are irrelevant because petitioners' noncompliance with the Decree was not then and is not now disputed. See Pet. at 3. Therefore, the focus of the appeal was properly on petitioners' efforts to limit or vacate the Decree for other reasons.[7]

---

7. The Court of Appeals decided only the following questions: whether "(1) the district court lacked jurisdiction to modify the decree after 1982; (2) the district court exceeded

B. Dowell is Factually Different and Legally Distinct From the Issues Presented by This Case

Petitioners try in vain to fit this case into the mold of Board of Ed. Oklahoma City v. Dowell, supra, 112 L.Ed.2d 715. Their attempt fails because the central concern in Dowell -- whether local officials who are complying with the Constitution and the injunction should be subject to "judicial tutelage for the indefinite future" -- is not present.

Dowell is a thirty year old school desegregation case in which the district court imposed on local school officials an injunction to end de jure discriminatory practices. The injunction will continue of its own force unless dissolved upon proper motion. After school officials fully complied with the injunction for five years, the district court found that defendants would in the future continue constitutional practices without the burden of an injunction. Id. at 724. The court terminated its jurisdiction of the case. Ibid.

On this record this Court remanded the case back to the district court to decide, based on a totality of circumstances, whether school officials have eliminated all vestiges of past discrimination and whether school officials complied with the injunction in good faith. Id. at 729. The present case could not be more different.

This history of this case is reminiscent of the Court's recent description of the protracted litigation in United States v. Swift & Co., 286 U.S. 106 (1932): "The defendant meat-packers and their

---

its jurisdiction in enforcing the consent decree outside of North Seg; and (3) the district court abused its discretion in denying prison officials' motion to vacate the decree on Eleventh Amendment grounds." Pet. App. A-13.

allies had over a period of a decade attempted, often with success in the lower courts, to frustrate operation of the decree." Dowell, at 727. The only significant difference between Swift and this case is that here the lower courts have refused to cooperate with prison officials' attempts to evade their self-imposed responsibilities under the Decree.

The injunction in Dowell continues indefinitely. That is not the case here. The Consent Decree would have expired by its own terms ten years ago if prison officials had fulfilled their part of the bargain.[8] Pet. App. A-5.

Petitioners state that the past nine years "should have been more than enough time to have 'enabled the District Court to observe the good faith of petitioners in complying with the Decree . . .'" Pet. at 19. That is certainly true; there has been time enough for accurate observation. The District Court's definitive rulings which petitioners studiously avoid, are telling -- the findings are a litany of petitioners' continued and unabated failures to comply with the Decree[9] and the Constitution.[10]

---

8. In their petition, prison officials concede they are not complying with some provisions of the Decree because they have unilaterally decided they are "unnecessary" or "too burdensome." Pet. at 3.

9. For example, in 1981 petitioners did not comply with provisions concerning attorney visits and screening of correctional officers. CR. 100, 113 [court order extending jurisdiction for noncompliance]. In 1985 petitioners failed to properly maintain the unit law library, provide adequate psychiatric care, provide the prescribed number of weekly showers and permit group religious services. CR. 228, 241 [order finding noncompliance with Decree]. The monitor's most recent findings of noncompliance are set forth in Statement of Case, supra §H. See also Pet. App. at A-60-67, 98-101, 103.

In Dowell school officials took the opposite approach; they complied with the injunction. Accordingly, on remand there appears to be a substantial likelihood that the District Court may grant their motion to dissolve the permanent injunction. For California prison officials the same course remains available. Rather than fighting every step of the way, the surest road to achieve their desired goal is to promptly and consistently comply with the Decree and the Constitution. The key to ending this case is now, as it always has been, in petitioners' hands.[11]

---

10. The best example is petitioners' refusal to provide condemned prisoners with access to the courts. In 1986 the Ninth Circuit held that the paging system employed by prison officials at San Quentin to provide prisoners in segregation with law books was unconstitutional under Bounds v. Smith, 430 U.S. 817, 828 (1977). Toussaint v. McCarthy, 801 F.2d 1080, 1109 (9th Cir. 1986). To comply with the Ninth Circuit's mandate, prison officials eventually set up a satellite law library for segregated prisoners. See Toussaint v. McCarthy, 918 F.2d 752 (9th Cir. 1990). Petitioners did not let prisoners on Death Row use this library or provide any other acceptable alternative.

The district court in the present case directed petitioners to allow condemned prisoners physical access to a law library. Pet. App. A-40, A-101. Petitioners appealed to the Ninth Circuit without seriously contesting this part of the order, except to the extent it is covered by their argument that the entire decree should be vacated. To this day, petitioners refuse to provide physical access to the library as required by Bounds, Toussaint and the district court's order in this case.

11. The California Department of Corrections has a history of ignoring court orders. Prison officials have been held in contempt at least one other prison case. See Toussaint v. McCarthy, 597 F. Supp. 1427 (N.D. Cal. 1984). A motion for contempt is now pending in Toussaint because of prison officials' alleged failure to comply with the preliminary injunction at the Correctional Training Facility at Soledad.

Special Masters have been appointed in two other cases involving San Quentin because of prison officials' sorry history of abiding by court decrees. See Toussaint v. McCarthy, 597 F. Supp. 1388, 1407, 1418 [court orders have been disregarded; compliance "spotty at best"]; Marin v. Rowland, C-80-0012 MHP

II.

THE NINTH CIRCUIT'S REJECTION OF PETITIONERS' ELEVENTH AMENDMENT CLAIM DOES NOT CONFLICT WITH THE DECISION IN PENNHURST OR WITH OTHER COURT OF APPEALS DECISIONS, AND BECAUSE PETITIONERS, BY AGREEING TO THE DECREE AND FAILING TO RAISE ANY SUCH CLAIM FOR MANY YEARS, LONG AGO WAIVED ANY ELEVENTH AMENDMENT DEFENSE.

The Ninth Circuit had no difficulty rejecting petitioners' claim that the Eleventh Amendment prohibits enforcement of the Decree. Pet. App. at 18-19. Petitioners assert that this ruling conflicts in principle with this Court's decision in Pennhurst State School & Hospital v. Halderman, 465 U.S. 89 (1984), and that the circuits are in conflict regarding whether the Eleventh Amendment bars enforcement of a decree of the kind at issue in the present case. Pet. at 22-25. Petitioners are wrong in both assertions; their attempt to persuade the Court otherwise is but another bid to delay their compliance through obfuscation of the issues.

Petitioners first assert that Pennhurst prohibits federal courts from enforcing the Decree in the instant case because, they imply, it is a remedy that does not spring from, address, or relate to a federal right. Id. at 22-23. This premise misreads Pennhurst, ignores subsequent decisions of this Court and the Court of Appeals regarding the authority of federal courts to enter and enforce consent decrees, misreads the record of this case, and overlooks the fact that petitioners long ago consented to the jurisdiction of the federal courts.

(N.D. Cal.) [special master appointed in part because prison officials failed to comply with decree regarding medical and psychiatric care].

Pennhurst held that the Eleventh Amendment bars lawsuits against state officials for injunctive relief when the only basis for that relief is to ensure compliance with state law. Pennhurst, supra, 465 U.S. at 106. The Court reasoned that no federal interest in the supremacy of federal law is present in such a case, and that, rather, a federal court instructing state officials on how to conform their conduct to state law represented a great intrusion on state sovereignty. Id. at 105-106.

The concerns regarding state sovereignty and the lack of any federal interest that were critical to Pennhurst are not applicable to the present case, where, as the Ninth Circuit stated, the lawsuit was brought against state officials to vindicate federal constitutional rights. See Pet. App. at 18; see also discussion infra. Petitioners badly misread Pennhurst.

In addition, Pennhurst recognized that Eleventh Amendment immunity may be waived, and that a State may consent to suit against it in federal court. Pennhurst, supra, 465 U.S. at 99. In the present case, petitioners waived any Eleventh Amendment defense by agreeing to the Decree, thus explicitly consenting to the federal court's jurisdiction. See Delaware Valley Citizens' Council v. Commonwealth of Pennsylvania, 678 F.2d 470, 475 (3rd Cir.), cert. denied, 459 U.S. 969 (1982); New York State Ass'n for Retarded Children v. Carey, 596 F.2d 27, 39 (2d Cir. 1979). If their consent to judgment by way of the Decree were not enough, petitioners' waiver of any Eleventh Amendment defense may be inferred from their partial compliance with the Decree and prolonged failure to raise any such

objection until many years after the Decree was entered and Pennhurst decided. See Garrity v. Sununu, 752 F.2d 727, 738 (1st Cir. 1984).

Petitioners' assertion that the Decree cannot be enforced to the extent that it provides relief not specifically required by federal law also conflicts in principle with the Court's decision in Local Number 93, International Association of Firefighters v. City of Cleveland, 478 U.S. 501 (1986). In Local Number 93, the Court held that if certain criteria were met a court in a Title VII case could enter a consent decree that provided relief in excess of that which pursuant to federal statute could have been ordered after trial as long as the remedy did not conflict with the enabling statute. Although Local Number 93 did not address an Eleventh Amendment claim, the Court's rejection of any doctrine prohibiting relief in a consent decree that may not have been available after trial, so long as the case was based on a federal question, is equally applicable to the present case, in which the Decree arises from a suit based on claims of federal constitutional violations.

Local Number 93 set forth the criteria that must be met before a district court may enter a consent decree. The Court held that before entering a decree the court must be certain that the decree: (1) "spring[s] from and serve[s] to resolve a dispute within the court's subject matter jurisdiction," (2) "come[s] within the general scope of the pleadings," and (3) "further[s] the objectives of the law upon which the complaint was based." Id. at 525. If these three conditions are met, the decree may contain relief broader than that which the court could have awarded after trial. Ibid.

The Decree in the present case meets the Local Number 93 criteria. The complaint in the present action alleged that conditions of confinement violated the prisoners' federal constitutional rights, and that federal rights to due process and equal protection were violated by petitioners' practice of automatically placing condemned prisoners in administrative segregation without individual determinations that general population housing would seriously endanger safety or security. See Statement of Case, supra. The Decree resolved these claims by, essentially, allowing petitioners to maintain certain conditions of confinement, and, with regard to the automatic segregation claim, requiring that certain general population-like conditions of confinement be provided to all prisoners, except those which petitioners determined that safety or security required segregation-like conditions. Ibid.

The Decree, in short, resolved a dispute within the District Court's subject matter jurisdiction, fit within the general scope of the pleadings, and by remedying certain conditions of confinement for all condemned prisoners and ameliorating the arbitrary classification of condemned prisoners through provision of general population-like conditions of confinement for some of the prisoners, furthered the objectives of the legal principles underlying the complaint. Under the rule announced in Local Number 93, the District Court in the present case clearly had authority to enter the Decree. Therefore, petitioners' argument that the remedy enforcing the liberty interest established by state law goes beyond constitutional minima (Pet. at 10) is beside the point.

If the court could validly enter the Decree, it could, contrary to petitioner's assertions, surely enforce it. Two Circuits have relied on Local Number 93, 478 U.S. at 525, when upholding district court orders enforcing a decree that requires more than what the court could order after trial. Kozlowski v. Coughlin, 871 F.2d 241, 244 (2d Cir. 1989); see also Duran v. Carruthers, 885 F.2d 1485, 1491 (10th Cir. 1989).

Petitioners also are wrong when they claim that the Ninth Circuit's rejection of their Eleventh Amendment arguments conflicts with other appellate decisions. First, petitioners correctly point out (see Pet. at 23-24) that the Second and Tenth Circuits (in Kozlowski and Duran) have ruled that so long as the Local Number 93 criteria are met, there is no Eleventh Amendment bar to enforcement of a decree, even where some provisions exceed the remedies required by violations of federal rights.

However, the cases cited by petitioners as being in conflict with these Circuits and the Ninth Circuit ruling herein do not in fact reach contrary conclusions. Petitioners' assertion that Lelsz v. Kavanagh, 807 F.2d 1243, rehearing denied, 815 F.2d 1034 (5th Cir.), cert. dismissed, 108 S.Ct. 44 (1987) is inconsistent is based on an overbroad reading of the court's holding. In Lelsz, the Fifth Circuit prohibited enforcement of a portion of a decree that rested entirely on state law grounds. Ibid. The Fifth Circuit, in two cases not cited by petitioners herein, has subsequently limited Lelsz to decrees or portions of decrees based solely on state law. Lelsz v. Kavanagh, 824 F.2d 372, 373 (5th Cir. 1987) (hereinafter Lelsz

II); Ibarra v. Texas Employment Commission, 823 F.2d 873, 876-77 (5th Cir. 1987).

In Lelsz II, the Fifth Circuit held that regardless of their first ruling in Lelsz, provisions of the consent decree based on federal rights could be enforced. Lelsz II, 824 F.2d at 373. In Ibarra, the Fifth Circuit rejected an Eleventh Amendment challenge to a consent decree because the suit from which the decree followed was based on federal law and again specifically limited the first Lelsz decision to portions of decrees based solely on state law. Ibarra, 823 F.2d at 877. Similarly, there is no conflict between other appellate decisions and Washington v. Penwell, 700 F.2d 570 (9th Cir. 1983), asserted by petitioners to be in conflict because it "recognized" that a consent decree may not be enforced "unless enforcement is needed to remedy a federal law violation." Pet. at 23. The court's observation in Washington does not conflict with the decision in the present case, because herein, as in Kozlowski and Duran, enforcement of the Decree is necessary to remedy a federal law violation.[12/]

In sum, the Fifth, Second and Tenth Circuits as well the Ninth Circuit in the present case have all announced and applied a consistent rule: so long as a consent decree springs from a complaint based on federal law, the Eleventh Amendment does not bar entry or enforcement of that decree. Because there is no conflict

---

12. The decree provision at issue in Washington also was found to be void because it was agreed to by state officials who had no authority to enter into it. Id. at 573. Of course, there is no such deficiency with regard to the Decree in the present case.

between the circuits, and because the rule applied here is consistent with the decision in Pennhurst and follows that applied in Local Number 93, the petition for certiorari should be denied.

III.

THE NINTH CIRCUIT'S AFFIRMANCE OF THE DISTRICT COURT'S CAREFULLY CONSIDERED, FACT-SPECIFIC, FLEXIBLE RULINGS REGARDING DECREE MODIFICATIONS DOES NOT CONFLICT WITH THIS COURT'S DECISIONS REGARDING THE DEFERENCE DUE PRISON OFFICIALS BECAUSE, EVEN ASSUMING THAT DEFERENCE MUST BE GIVEN TO PRISON OFFICIALS' VIEWS IN DETERMINING MODIFICATIONS TO CONSENT DECREES, THE COURTS BELOW DID SO.

Petitioners appear to suggest that the Ninth Circuit erred because in affirming an order that failed to adopt each and every modification they proposed, the decision conflicts with this Court's decisions respecting the deference due prison officials. This assertion is first wrong because the principles which led this Court to caution federal courts to defer to state prison officials when evaluating claims of constitutional violations are markedly absent in a case where state prison officials voluntarily enter into a consent decree. The assertion is also wrong because, even assuming such deference must be given when considering modifications to a consent decree, the District Court did so in present case by carefully considering the views of prison officials and in several significant respects modifying the Decree to their advantage.

The deference federal courts must in general give to state prison officials when considering a claim of a constitutional violation or in issuing an injunction is premised on a recognition that court orders cannot easily solve the problems of prisons, that the executive, *not* judicial, branch of government is responsible for

operating prisons, and, where state prisons are involved, that comity counsels caution on the part of federal courts. Turner v. Safely, 482 U.S. 78, 85 (1987). Where judgment is entered by means of a consent decree, however, prison officials have agreed that a decree will resolve the problem, and those officials have voluntarily relinquished some of their authority to the requirements of the decree. As such, the deference due prison officials when liability is determined, or when the court imposes a remedy, should not apply. Cf. Local Number 93, 478 U.S. at 521-522 [limitations placed by Congress on limits of Title VII remedies inapplicable where judgment created by consent decree]. For this fundamental reason, the Ninth Circuit's decision cannot conflict with this Court's decisions requiring lowers courts to defer in some measure to the judgment of prison officials before issuing an injunction.

Even assuming, however, that such deference must be given to prison officials' views when modifications to a consent decree are considered, the Ninth Circuit decision does not conflict with that principle. The Court of Appeals held that a decree may be modified whenever "experience with the administration of the decree shows the need for modification in order to accomplish the primary goals of the decree." Pet. App. at A-13. This standard, with its emphasis on the practical day-to-day ramifications of decrees, itself requires courts to focus on the opinions and experience of the parties.

The Ninth Circuit's focus on "experience with the administration of the decree" also shows that the standard is a flexible one, and is not dependent on any showing of unforseen circumstances or an injustice. Indeed, the standard applied in the present case is light

years from the "grievous wrong" standard set forth in United States v. Swift & Co., 286 U.S. 106, 119 (1932).

The District Court and its Monitor properly identified the Ninth Circuit's flexible standard in evaluating the requested modifications. Although petitioners castigate the Monitor for adopting a standard for modification that is "not susceptible of any definition," they themselves then correctly state that the standard applied was one which considered all the specific facts and circumstances present. Pet. at 7-8 and fn. 4. One could hardly imagine a more flexible standard. In fact, the standard for modification of consent decrees urged by the jail officials in the Suffolk County Jail cases presently pending before the Court (see Pet. 1, fn. 1 and 59 U.S.L.W. 3546-3547) is precisely that which was applied in the present case.[13/]

The record of the present case also makes clear that the Ninth Circuit properly affirmed the order of the District Court and its Monitor regarding application of the flexible standard to the requested modifications. As the District Court stated, and as the Court of Appeals agreed, the Monitor who initially considered the requests "very thorough[ly] review[ed] and consider[ed]...all the evidence and relevant circumstances." Pet. App. at A-20.

Based on the Monitor's report, the District Court ordered some modifications as requested by prison officials.[14/] For example, based

---

13. Thus, no useful purpose would be served by holding this case pending a decision in the Suffolk County Jail cases.

14. As discussed in the Statement of the Case, this was not the first time the district court had modified the decree to remedy concerns expressed by prison officials.

on prison officials' security concerns, the court substantially modified the Decree by eliminating the requirement that Grade B prisoners be allowed to possess certain items and be allowed access to a telephone. See Pet. App. at A-19 through A-20.

Similarly, in eliminating the Decree's requirement that condemned prisoners in East Block be allowed tier time, the District Court's Monitor found that enforcing that requirement would unnecessarily entangle the District Court in prison operations and might jeopardize security. See Pet. App. at A-63 through 66. Clearly, these very major modifications which significantly reduce petitioners' obligations are proof that their views were given deference.

Petitioners, however, complain that their views were not given deference because the Decree was modified to require that certain recreational equipment be placed on the outdoor exercise yard. See Pet. at 27. In complaining about this modification, petitioners fail to mention that it was coupled with a modification which eliminated the requirement that they provide such equipment indoors. See Pet. App. at A-75 through A-78. In addition, the Monitor found that petitioners presented "no evidence" that such equipment jeopardized security. Id. at A-77.

Petitioners further complain that the Decree was not modified to eliminate their obligations to provide a roof over part of the outdoor exercise yard, to provide a shelf in particular cells, and to allow certain prisoners the opportunity to purchase certain sundries. Pet. at 27. Again, petitioners ignore the fact that they presented

absolutely no evidence to support their views.[15] See Pet. App. at A-68 through A-70, A-82 through A-83, and A-87 through A-88. With respect to the yard roof, petitioners' request to eliminate the requirement was based solely on the asserted cost of compliance; the District Court, however, found that any alternative method of compliance would cost literally millions of dollars more than simply installing a roof. Id. at A-69 through 70.

In sum, the record shows that the Ninth Circuit's affirmance of the District Court's order regarding Decree modifications was correct. The District Court applied a flexible standard that gave deference to petitioners' views, and that deference in fact resulted in substantial modifications to the benefit of petitioners. Where petitioners' views did not prevail, the District Court's decision, and the Ninth Circuit's affirmance, were based on findings that the evidence presented did not support petitioners' assertions. The Court of Appeals decision does not conflict in principle or otherwise with this Court's decisions and, because a flexible standard was applied by the courts below, granting certiorari in this case would accomplish nothing but delay compliance with the modified Decree. For these reasons, the petition should be denied.

---

15. Petitioners, in complaining that the courts rejected certain of their modification requests even though no evidence was adduced to support their assertions, forget that even the deference given to prison officials when determining whether constitutional violations have occurred requires judicial scrutiny, not simply pure deference to prison officials' views regarding such claims or to blind acceptance of claims that security would be jeopardized. See, e.g., Turner v. Safely, 482 U.S. at 97 (invalidating regulation requiring approval to marry because record shows rule not reasonably related to legitimate objective).

IV.

THERE IS NO CONFLICT AMONG THE CIRCUITS ON THE APPEALABILITY OF POST-JUDGMENT ORDERS AFFECTING AN EQUITABLE DECREE

Petitioners argued in the Ninth Circuit that the Consent Decree should apply only to prisoners housed in North Seg. The Ninth Circuit rejected the argument without reaching the merits because it found that over the last eight years petitioners had numerous opportunities to appeal the issue and had treated the Decree as if it applied to prisoners in other units. The District Court held further that petitioners were judicially and equitably estopped from asserting a contrary position.

Petitioners now claim this Court should grant certiorari because there is a conflict among the circuits about the appealability of post-judgment orders affecting an equitable decree. The only decision they cite to prove a conflict is a pre-judgment case that uses the same reasoning as the Ninth Circuit in a previous ruling in this case. Because there is no conflict and estoppel would prevent petitioners from prevailing in any event, the Court should not grant the writ.

A. The Ninth Circuit's Ruling Does Not Conflict with the First Circuit

Petitioners assert that certiorari should be granted because the Ninth Circuit's opinion conflicts with Ramirez v. Rivera-Dueno, 861 F.2d 328 (1st Cir. 1988). Pet. at 29. Once again, there is no conflict to be resolved by this Court. Ramirez was a pre-judgment case in which the district court denied defendants a trial and instead appointed a special master to meet and confer with the

parties.[16] The Court of Appeals correctly characterized the order as one relating to the conduct and progress of the litigation. Id. at p. 334. Unlike the present case, there was no injunction or consent decree to be modified; it was merely a pre-trial order intended to resolve the case short of trial. In Ramirez and the present case, both circuits applied a consistent standard based on this Court's decision in Carson v. American Brands, Inc., 450 U.S. 79 (1981).

An order that grants, continues, modifies, refuses or dissolves, or refuses to dissolve or modify an injunction may be appealed under 28 U.S.C. §1292(a). In Carson, this Court set out the standard to apply in determining whether an appeal falls under this statute. First, the order should have the practical effect of granting or denying an injunction. Second, it must have serious, perhaps irreparable, consequences. Finally, the order needs to be one that can be effectively challenged only by immediate appeal. Carson, supra, 450 U.S. 79, 84.

This standard has been consistently adopted by courts throughout the circuits. See EEOC v. Pan American World Airways, Inc., 796 F.2d 314, 316-317 (9th Cir. 1986); Roberts v. St. Regis Paper Co., 653 F.2d 166, 170 (5th Cir. 1981); Chronicle Pub. Co. v. Hantzis, 902 F.2d 1028-1031 (1st Cir. 1990).

In Ramirez, the First Circuit concluded that the appointment of a special master did not meet the first prong of this test. Because the special master was only appointed to determine whether a

---

16. The First Circuit granted relief by treating the appeal as a petition for writ of mandate and ordering the district court to set a trial date. Id. at 334-335.

settlement could be achieved, the order did not affect an injunction. Ramirez v. Rivera-Dueno, 861 F.2d at 334. In a similar fashion, the Ninth Circuit in an earlier opinion in the present case dismissed petitioners' appeal because the appointment of a special master did not modify the Decree. Thompson v. Enomoto, 815 F.2d 1323, 1327 (9th Cir. 1987).

Both circuits applied the same standard, used the same reasoning, and reached the same result. Carson set forth the applicable test. It is not something this Court need again decide.

B. The Appealability of the District Court's Orders.

Petitioners' main argument is not that the order appointing a special master was appealable, but that other orders applying the Decree outside of North Seg were not. This assertion is wrong, both for orders entered before and after the special master was appointed.

As early as January, 1982, the District Court rejected petitioners' opposition to expand the scope of the Decree beyond North Seg and retained its authority to ensure that petitioners substantially complied with its terms. CR. 133. Except for limited terms agreed upon by both parties, the court denied petitioners' motion for modification. Ibid.

There is, in fact, little difference between the effect of this order and the October 5, 1989, order now being contested. Both orders rejected petitioners' attempts to dissolve the Decree, applied the Decree to condemned prisoners outside of North Seg, and maintained jurisdiction to assure compliance. All parties agree that the 1989 Order is "final" under 28 U.S.C. §1291, subject to appeal. See Defendants-Appellants Opening Brief, Thompson v. Enomoto, No. 89-

16420, dated February 7, 1990, p. 1. The same is true of the earlier order.

The scope of the Decree also was at issue in June, 1982, when the District Court ordered the parties to negotiate further modifications outside of North Seg. Thompson v. Enomoto, 542 F.Supp. 758 (N.D. Cal. 1982). Petitioners could have appealed. Roberts v. St. Regis Paper Co., 653 F.2d 166, 170 (5th Cir. 1981.) [extending consent decree's scope is appealable under Carson standards].

In March, 1983, the court refused to dismiss the action simply because the Decree was being complied with in respect to the named plaintiffs housed in North Seg. CR 206; see also CR 185. Refusal to dismiss an injunction is appealable. See Kerwit Medical Products Inc. v. N. & H. Instruments, Inc., 616 F.2d 833 (5th Cir. 1980) [order denying motion to vacate consent decree].

At the same time, the District Court found petitioners in contempt for failing to maximize visiting opportunities for prisoners in the Adjustment Center, another unit outside North Seg. Reporters Transcript, dated March 17, 1983, p. 20; CR 206; Pet.App. A-113. Contempt is appealable where it appears the district court enlarged upon the original judgment. See Szabo v. U.S. Marine Corp., 819 F.2d 714, 716-718 (7th Cir. 1987) [post-judgment contempt order appealable].

Finally, in December, 1986, the court found that the Decree applied to all condemned prisoners, wherever housed in San Quentin. CR 327, 342. The practical effect of this was to enforce the Decree outside of North Seg. Petitioners agree that this order was an "interpretation" concerning the scope of the Decree. Pet. at 5. As

such, it was an appealable modification. International Assn. of Machinists v. Eastern Airlines, 849 F.2d 1481, 1485-1486 (D.C. Cir. 1988).

Thus, the Court of Appeals simply applied the same standards used by courts throughout the circuits. As such, it had ample grounds for concluding:

> It would be nonsensical to permit the prison officials to appeal the issue of the applicability of the decree to the Inmates outside of North Seg at this juncture of the case. The prison officials had their opportunity to appeal the modification of the decree . . . . Under the doctrine of the law of the case, the court's interpretation of the decree must stand.

Thompson v. Enomoto, 915 F.2d at 1390 (citation omitted).

C. Petitioners' Conduct Estops Them From Prevailing.

Even if petitioners could not have appealed the orders of the District Court described above, their own conduct estops them from successfully litigating the issue.[17/]

The District Court's ruling applied two kinds of estoppel -- equitable and judicial -- to petitioners' conduct. Pet. App. A-116. The court applied equitable estoppel because petitioners prejudiced respondents by representing in other proceedings that the Decree governs condemned prisoners outside of North Seg. Ibid; see Davis v. Waklee, 156 U.S. 680, 689 (1985).

The District Court also applied the doctrine of judicial estoppel, which prohibits a party from asserting a position in litigation that is contrary to a previously asserted position.

---

17. Petitioners have not sought certiorari on this issue. Therefore, this part of the lower court's ruling is final and binding on all parties.

Rockwell International v. Hanford Atomic Metal Trades Council, 851 F.2d 1208, 1210 (9th Cir. 1988). See also, Jett v. Zink, 474 F.2d 149, 155 (5th Cir.), cert. denied, 414 U.S. 854 (1973); Scarano v. Central Ry. Co. of New Jersey, 203 F.2d 510, 513 (3rd Cir. 1953). The court found that petitioners' position is inconsistent with that taken earlier in successfully moving the court to modify the Decree in units other than North Seg. Pet. App. A-116.

The Court of Appeals made the same basic point:

> If the decree had ceased to exist in 1982, or if the decree had been confined to North Seg Inmates, it would be nonsensical for the prison officials to have attempted to negotiate modifications to the decree for eight years for the inmates housed outside of North Seg.

Thompson v Enomoto, 915 F.2d at 1389-1390.

CONCLUSION

For the reasons stated above, the petition for writ of certiorari should be denied.

Respectfully submitted,

DONALD SPECTER
[Counsel of Record]
STEVEN FAMA
ARNOLD ERICKSON

Prison Law Office
General Delivery
San Quentin, CA 94964
(415) 457-9144

Attorneys for Respondents

April 1991

CERTIFICATE OF SERVICE BY MAIL

JAMES ROWLAND, et al. Petitioners, v. MAURICE S. THOMPSON, et al., Respondents.	No. 90-1499 ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOHN G. DONHOFF, JR., a member of the Bar of the Supreme Court of the United States, states:

That his business address is 455 Golden Gate Avenue, Room 6200, in the City and County of San Francisco, State of California; that on May 6, 1991, he served a true copy of the attached Reply Brief of Petitioners on Writ of Certiorari in the above-entitled matter on counsel for petitioner by placing same in envelope addressed as follows:

DON SPECTER
PRISON LAW OFFICE
GENERAL DELIVERY
SAN QUENTIN, CA 94964

ROBERT R. RIGGS
15 SHATTUCK SQUARE, SUITE 205
BERKELEY, CA 94704

Said envelope was then sealed and deposited in the United States Mail at San Francisco, California, with the postage thereon fully prepaid.

JOHN G. DONHOFF, JR.
Deputy Attorney General

RECEIVED
MAY 8 1991
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

JAMES ROWLAND, Director of California Department of Corrections, et al.,	)	No. 90-1499
Petitioners,	)	
v.	)	PROOF OF SERVICE
MAURICE S. THOMPSON, et al.,	)	
Respondents.	)	

I, Donald Specter, a member of the Bar of this Court, hereby certify that on the 25th day of April 1991 one copy of the Opposition to Petition for Writ of Certiorari, Motion to Proceed in Forma Pauperis and Declaration of Andrew Robertson in the above-entitled case was mailed first class postage prepaid to John Donhoff, Deputy Attorney General, 455 Golden Gate Avenue, Suite 6200, San Francisco, California 94102, counsel for all petitioners herein. I further certify that all parties required to be served have been served.

Respectfully submitted,

Donald Specter

Donald Specter
Prison Law Office
General Delivery
San Quentin, California 94964
(415) 457-9144

Attorney for Respondents

CERTIFICATE OF SERVICE BY MAIL

90-1499

JIRO J. ENOMOTO, et al.,

Petitioners,

v.

MAURICE S. THOMPSON, et al.,

Respondents.

RECEIVED
MAR 14 1991
OFFICE OF THE CLERK
SUPREME COURT, U.S.

JOHN G. DONHOFF, JR., a member of the Bar of the Supreme Court of the United States, states:

That his business address is 455 Golden Gate Avenue, Room 6200, in the City and County of San Francisco, State of California; that on March 13, 1991, he served the required number of true copies of the Petition for Writ of Certiorari and Separate Appendix Petition for Writ of Certiorari in the above-entitled matter on counsel for respondents and the Clerk of the Court of Appeals of the Ninth Circuit, by placing same in envelope(s) addressed as follows:

CLERK OF COURT
U. S. COURT OF APPEALS
NINTH CIRCUIT
P. O. BOX 547
SAN FRANCISCO, CA 94101

JEFFREY D. WOHL
ORRICK, HERRINGTON &
SUTCLIFFE
400 SANSOME STREET
SAN FRANCISCO, CA 94111

DON SPECTER
PRISON LAW OFFICE
GENERAL DELIVERY
SAN QUENTIN, CA 94964

Said envelope(s) were then sealed and deposited in the United States Mail at San Francisco, California, with the postage thereon fully prepaid.

JOHN G. DONHOFF, JR.
Deputy Attorney General